IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-450

BELLINGHAM STEVEDORING COMPANY,
Petitioner,

—v.—

DAMPSKIBSAKTIESELSKABET, *etc., et al,*
INTALCO ALUMINUM CORPORATION and
AMERICAN METAL CLIMAX, INC.,
Respondents.

BRIEF OF RESPONDENTS INTALCO ALUMINUM CORPORATION AND AMERICAN METAL CLIMAX, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

THE PETITION WAS NOT FILED IN TIME 1

STATEMENT IN REPLY TO POINT I 3

- Summary 3
- Petitioner Did Not Designate Mr. Otto As Its "Chief Counsel" 3
- Petitioner Did Not Present This Contention in the Court Below 5
- There Is No Constitutional Right to Representation By Non-Resident, Non-Admitted Counsel 6

STATEMENT IN REPLY TO POINT II 6

STATEMENT IN REPLY TO POINT III 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Page

Citizens' Bank of Michigan City v. Opperman, 249 U.S. 448, 63 L. Ed. 701, 39 S.Ct. 330 (1919) 2

Dampskibsaktieselskabet etc. v. Bellingham Stevedoring Company, etc., 457 F.2d 889 (1972) 2

Federal Trade Commission v. Minneapolis-Honeywell R. Co., 344 U.S. 206, 97 L.Ed. 245, 73 S.Ct. 245 (1952) 3

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 69 S.Ct. 535, 70 S.Ct. 854 (1949) 7

Gypsy Oil Company v. Escoe, 275 U.S. 498, 72 L.Ed. 393, 48 S.Ct. 112 (1927) 2

McCullough v. Kammerer Corporation, et al, 323 U.S. 327, 89 L.Ed. 273, 65 S.Ct. 297 (1945) 6

Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 72 L.Ed. 290, 48 S.Ct. 303 (1927) 8, 9

Sanderlin v. Old Dominion Stevedoring Co., 305 F.2d 80 (4th Cir. 1967) 8

Semble United States v. Healy, 376 U.S. 75, 78, 11 L.Ed. 2d 527, 84 S.Ct. 553 (1964) 2

Rules

Rule 40 of the Federal Rules of Appellate Procedure 2

Statutes

Sec. 2101(c) of Title 28, United States Code 2

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PRELIMINARY STATEMENT

Respondents American Metal Climax, Inc. and Intalco Aluminum Corporation submit this Brief in Opposition to the Petition for Writ of Certiorari primarily to rebut the unwarranted attack made by Petitioner on the trial judge, who has himself no avenue for correction of the record.

THE PETITION WAS NOT FILED IN TIME.

The Judgment of the United States Court of Appeals for the Ninth Circuit which Petitioner attacks was rendered on March 24, 1972. Petition for Writ of Certiorari, p. 1;

Dampskibsaktieselskabet etc. v. Bellingham Stevedoring Company, etc., 457 F.2d 889 (1972).

A Petition for Rehearing was filed on April 4, 1972, within the time specified by Rule 40 of the Federal Rules of Appellate Procedure, and was denied by Order of the Court of Appeals on June 12, 1972, as correctly stated in the Petition.

Section 2101 (c) of Title 28, United States Code (Act of June 25, 1948, c.646, 62 Stat. 961, as amended) provides in pertinent part as follows:

> "§ 2101
>
> . . .
>
> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a court action . . . before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree."

The running of the ninety-day period was extended by the timely Petition for Rehearing, but began to run on the date of the Order Denying the Petition, and the date of entry of the Order denying the Petition controls as to the timeliness of the Petition for Certiorari. *Citizens' Bank of Michigan City v. Opperman*, 249 U.S. 448, 63 L.Ed. 701, 39 S.Ct. 330 (1919); *Gypsy Oil Company v. Escoe*, 275 U. S. 498, 72 L.Ed. 393, 48 S. Ct. 112 (1927); *Semble United States v. Healy*, 376 U.S. 75, 78, 11 L.Ed. 2d 527, 84 S. Ct. 553 (1964).

The Order Denying the Petition for Rehearing having been rendered on June 12, 1972, the ninety-day period for application for Certiorari expired on September 11, 1972.

Petitioner's position is not assisted by reason of its having filed a "Suggestion of Hearing En Banc" in the Court of Appeals on June 23, 1972, after denial of the Petition for Rehearing and issuance of the Court of Appeals mandate. The Court of Appeals, by Order entered on August 7, 1972,

declined to consider the Suggestion as being "inexcusably late." In *Federal Trade Commission v. Minneapolis-Honeywell R. Co.*, 344 U.S. 206, 97 L.Ed. 245, 73 S.Ct. 245 (1952), the Judgment of the Court of Appeals was entered on July 5. Thereafter, after expiration of the time for filing of a Petition for Rehearing the Commission filed a Memorandum asking for correction of the Judgment, and a corrected Judgment was entered on September 18. The Petition for Certiorari was filed on December 14. This Court dismissed the Petition, as not timely filed, holding that the Judgment of July 5, which was not modified in any respect material to the issues sought to be raised in the Supreme Court, by judgment entered on September 18, started the running of the ninety-day period.

STATEMENT IN REPLY TO POINT I

Summary

Petitioner did not designate Mr. Otto "to act as chief counsel" in the trial court. It did not contend in the Court of Appeals that the District Court Judgment should be reversed because it was denied representation by counsel of its choice. There is no constitutional right to representation in a civil case by non-resident, non-admitted counsel.

Petitioner Did Not Designate Mr. Otto As Its "Chief Counsel"

The Petition states that petitioner "designated Samuel C. Otto . . . to act as chief counsel"; that the Court "was incensed at the appearance of [Mr. Otto and his two assistants]"; and that the District Court "incredibly refused to permit him to act as chief counsel. . . ." (Petition p. 3)

Petitioner displays a reckless lack of candor in making those assertions. If, in fact, petitioner had designated Mr.

Otto as its chief counsel, no one ever so informed the District Court or the other parties.

Petitioner reproduces on page 4 of its Petition, remarks of the District Court with respect to the participation of Mr. Otto and his assistants. It carefully omits the portion of the transcript which immediately preceeds the quoted material. We supply this omission as follows:

> "MR. ZINN: Your Honor, before we proceed further may I address the Court?
>
> "THE COURT: Yes, you may.
>
> "MR. ZINN: Will you gentlemen come forward please. I would like to present to the Court and to counsel three gentlemen members of the bar of the State of New York and the various district courts in that state. Mr. Henry E. Otto, Mr. Theodore P. Daly and Mr. Samuel Otto. All of these gentlemen are associated with the firm of Richard T. Graham, and I move for their association as co-counsel in this case. Presently I think Mr. Samuel Otto will be the only one taking an active participation.
>
> "THE COURT: And what active participation will he take?
>
> "MR. ZINN: He may cross-examine some of the expert witnesses, your Honor." (Tr. p. 4)

In other words, the planned participation of Mr. Otto was the cross-examination of some of the expert witnesses. He did so (Lupton, Tr. p.470; Walker, Tr. p.571). He also conducted direct examination of one witness without objection or comment from any one (Duncan, Tr. p.694).

The remarks of the District Court which Petitioner characterizes as "incredible and offensive" must be placed in context. The Court was commencing a relatively simple three-day non-jury trial. There were four litigants—all of whose interests were adverse by reason of cross-actions. Plaintiffs Jebsens and Wilhelmsen were represented by one

lawyer; Intalco and American Metal Climax were represented by one lawyer; McDowell-Wellman was represented by two lawyers; and Bellingham came into District Court with four lawyers. We submit that the District Court was understandably surprised at the number of counsel which Bellingham thought necessary for the protection of its interests—particularly so when he had just been informed that of the total of four counsel, only two would participate actively in the courtroom, and that the participation of one of those two would be extremely limited. We further submit that the District Court was justifiably concerned that the proceedings might be unreasonably delayed, if Bellingham counsel held "committee meetings" at frequent intervals during the trial.

Finally, we invite the Court's attention to the following portion of the trial Transcript, at the conclusion of trial. (p.753)

> "THE COURT: . . .
>
> And I want to say to New York counsel who are here, and I haven't said this in many years to outside counsel, that it has been a real pleasure having you here. I regret that there was any reluctance in my mind about it at the start, and you are welcome to come back at any time.
>
> MR. OTTO: Thank you very, very much, Judge."

Petitioner Did Not Present This Contention in the Court Below

The contention of denial of the right to counsel of its choice, which is now argued as requiring the issuance of a Writ of Certiorari, for denial of a "fundamental", "constitutional" right, was not deemed significant enough by Petitioner to present to the Court of Appeals.

Petitioner's Brief as Appellant in the Court below stated five questions under "Statement of Issues", and stated nine points under "Specification of Errors". Denial of the right

to counsel is not urged as an "Issue" or assigned as a "Specification of Error".

The general rule is that "questions not raised or passed on below will not be considered by the Supreme Court on review. . . ." 32 Am. Jur. 2d 768, § 297. See also *McCullough v. Kammerer Corporation, et al,* 323 U.S. 327, 89 L.Ed. 273, 65 S.Ct. 297 (1945).

There Is No Constitutional Right To Representation By Non-Resident, Non-Admitted Counsel

In *Thomas v. Cassidy,* 249 F.2d 91 (4th Cir. 1957) the District Court had refused a non-resident, non-admitted attorney permission to appear *pro hac vice.* An appeal was taken from the order denying permission. The Court of Appeals held as follows:

> "It is well settled that permission to a nonresident attorney, who has not been admitted to practice in a court, to appear pro hac vice in a case there pending is not a right but a privilege, the granting of which is a matter of grace resting in the sound discretion of the presiding judge." (249 F.2d at 92)

This Court denied certiorari. 355 U.S. 958, 78 S.Ct. 544 (1958).

STATEMENT IN REPLY TO POINT II

Under Point II, Bellingham urges that there was no credible evidence to support the finding of the trial Court that Bellingham was negligent.

The Court of Appeals affirmed the trial court's finding in that respect (Appendix A to the Petition, p.6.a) and stated there was "ample evidence" to support the trial court's determination that Bellingham's employee had failed, directly contrary to the operating instructions given

to him, to either push the "Stop" button or engage the manual brake. (Appendix p. 4a)

In *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 69 S.Ct. 535, 70 S.Ct. 854 (1949) the Court stated:

> "A court of law, such as this court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of very obvious and exceptional showing of error." 336 U.S. at 275

In the light of this well-established principle, we do not undertake to review the voluminous evidence which both lower courts found supported the finding that Bellingham was negligent, nor to refute the statements made at pages 7-29 of the Petition.

We do wish to point out, however, that Bellingham's own expert witness, Duncan, had reported to Bellingham that:

> "The direct cause of the accident was the failure of the operator to press the stop button." (Duncan; Transcript—p.409).

Finally, defendant did not assign error below, and does not attack here, the District Court's finding of fact that Bellingham's employee was negligent in failing to shut off the motor generator. The District Court's finding on the issue was that Bellingham's employee had been instructed to shut off the motor generator, that he failed to do so and that the accident "could not have happened" if he had done so. (Opinion, Appendix B, pp. 11a-12a). This unchallenged finding alone precludes any justification for further review of the decision in this case.

STATEMENT IN REPLY TO POINT III

American Metal Climax, Inc. plaintiff in Cause No. 308 in the trial court, was the voyage charterer of the vessel

TROJA, and the consignee of her cargo of bulk alumina. The casualty to the unloader crane at the Intalco dock "made it impossible to discharge the remaining cargo" of the TROJA at Intalco's premises.

American Metal therefore (as soon as the boom was removed from the deck of the TROJA to permit movement of the vessel) diverted the TROJA from Ferndale, Washington to Vancouver, Washington where discharge of the remaining cargo was completed on December 11, 1966.

The foregoing facts were agreed in the Pretrial Order in this case. Paragraph 2(e), (f), (k), (l), (m). (R.54-55)

It was further admitted by Bellingham that American Metal incurred and paid extra costs totalling $22,765.72 which costs were solely, directly and proximately caused by the falling of the unloader boom" and that each of the items comprising such costs was "fair and reasonable in amount". (Adendum to Pretrial Order; R. 143).

Bellingham's Petition does not specify wherein the Court below erred in allowing American Metal recovery of expenses conceded to be actually incurred and paid, fair and reasonable in amount, and proximately caused by its negligence, other than to say that American Metal was not a demise charterer.

It must be Bellingham's legal contention that, as a stevedore, it owes no duty of care or warranty of workmanlike service in unloading to a voyage charterer and cargo consignee. That, of course, is not the law. See e. g. *Sanderlin v. Old Dominion Stevedoring Co.*, 305 F.2d 80 (4th Cir. 1967).

Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 72 L.Ed. 290, 48 S.Ct. 303 (1927) does not assist Petitioner. In *Robins*, a vessel while under repair under a contract between the owner and the yard was damaged by negligence of the yard and thus its return to service was delayed. Under the charter between the owner and Flint, a time charter-

er, the vessel would have been returned to Flint for the latter's use, on completion of repairs. Flint brought suit against the yard for loss allegedly sustained by it for loss of use of the vessel during the period of delay. The charter party provided that "the steamer was to be docked at least once in every six months, and payment of the hire was to be suspended until she was again in proper state for service." *Id.* at 307. Consequently, Flint had no liability to the vessel's owners for the delay, paid no hire or demurrage, and incurred no expense. In fact, the yard had settled the owner's claim against it. Under these circumstances, the Supreme Court said the charterer's "have no claim either in contract or in tort." *Id.* at 309.

That there is liability in this case seems obvious. The vessel owner's did not, as in *Robins,* release the tort-feasor; they brought suit against it. American Metal did not, as in *Robins,* seek to recover for its loss of use. Rather, American Metal sought to recover that which it was obligated to pay as a result of Bellingham's wrongful conduct, and which it in fact did pay. Unlike *Robins* the American Metal charter was in force and the vessel was in service under the charter at the time of Bellingham neglect or breach of warranty and American Metal's cargo was aboard.

CONCLUSION

1. The Petition was not filed within the time provided by law.

2. Petitioner did not designate Mr. Otto as its "chief counsel". He participated in the trial to the full extent indicated to the trial judge at the beginning of trial and more. No contention that it had been denied its choice of counsel was presented by Petitioner to the Court of Appeals. In any event, there is no constitutional right to representation by non-resident, non-admitted counsel.

3. The concurrent findings of both lower courts that Bellingham's negligence was the proximate cause of the cas-

ualty was amply supported, and is not subject to review on certiorari.

4. American Metal, as voyage charterer of the TROJA and consignee of her cargo is entitled to recover its extra costs, which Petitioner had stipulated were "solely, directly and proximately caused by the falling of the boom," and were fair and reasonable in amount.

Respectfully submitted,

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